Lim Hean Chong @ Teo Hean Chong v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–289 OF 2010
HASAN LAH, APANDI ALI AND MOHTARUDIN BAKI JJCA
19 OCTOBER 2011

Criminal Law — Penal Code — s 302 — Murder — Appeal against conviction — Circumstantial evidence — Whether prosecution had established motive — Whether involvement of third person was probability — Whether trial judge had misdirected himself in failing to consider evidence in its totality — Whether appellant raised any reasonable doubts — Whether there were gaps in prosecution's case

Leong Chin Meng ('the deceased') was found murdered in his shop that sold antique items ('the premises'). When the deceased's sister returned to the premises, the upper floor of which was used as the accommodation of the deceased and his sister, she found the collapsible grill locked and the appellant seated in the business area of the premises. According to the deceased's sister the appellant appeared pale and was perspiring when she questioned him as to her brother's whereabouts and his presence in the locked premises. The deceased's sister had then directed the appellant to hand to her the bunch of keys to open the grill before entering the premises and making her way to the back of the premises where she found the deceased's bloodied and bound body. The forensic pathologist confirmed the cause of death to be asphyxia due to manual strangulation with severe head injury. The appellant who fled the scene on a motorcycle was later arrested and charged with the offence of murder s 302of the Penal Code. In his defence the appellant, a regular customer of the deceased, testified that he was present at the premises to question the deceased about the questionable quality of three old coins that the deceased had sold to him the day before. According to the appellant, when he entered the premises he had spontaneously closed the grill, which had automatically locked itself, and that he had then found the deceased lying bound and motionless. He also testified that he encountered the deceased's sister while he was looking for the keys to unlock the grill and after unlocking the same he had fled the scene in panic and fear. The trial judge was satisfied that a prima facie case had been proved by the prosecution against the appellant and that the appellant's defence, which was a mere denial failed to raise a reasonable doubt on the prosecution's case. The appellant was convicted for murder, and hence this appeal. The appellant submitted that the trial judge had misdirected himself in failing to consider the entire evidence in its totality and thereby failing to realise the numerous gaps in the prosecution's case. The appellant submitted that the trial judge had failed to consider the absence of blood stains on the white shirt

worn by the appellant; the absence of any fingerprints or DNA evidence connecting him to the crime; the absence of any motive for the killing; and the possible involvement of a third person in the death of the deceased.

Held, allowing the appeal:

(1) The forensic pathologist gave evidence that the deceased sustained head injuries before he was asphyxiated. Thus, it was clear that the deceased would have bled before he was manually strangulated. Further the photographic exhibits also revealed that there were massive amounts of blood on the body of the deceased as well as in the vicinity where the deceased lay sprawled. However, the three prosecution witnesses who saw the appellant in the premises, made no mention of any bloodstains on the white coloured T-shirt worn by the appellant. The failure by the prosecution to address this issue raised some doubt as to whether it could be conclusively said that the deceased's death had been caused by or was in consequence of the act of the appellant (see paras 29–30 & 33).

(2) Although neither the appellant's fingerprints nor any DNA was found at the crime scene, the appellant was present at the crime scene. As such, there was no merit in the appellant's argument that the absence of any forensic link raised doubt in the prosecution's case (see paras 34 & 37).

(3) General motive of a crime was not an essential factor, but since the prosecution's case was based solely on circumstantial evidence, motive became important. Throughout the instant trial the prosecution had only suggested one motive, ie that the appellant was angry with the deceased because he was unhappy with one of three coins he had purchased from him. However, a suggestion was not evidence and based on the suggestion it could not be said that the prosecution had established the motive for the killing (see paras 41–42).

(4) The presence of a bag that was recovered from the scene of the crime and had been handed over to the investigation officer ('IO') went missing from police custody. Although the IO, in his evidence, confirmed that this bag constituted a piece of crucial evidence capable of proving the presence of third persons at the scene of the crime there was a lack of investigation into this. As such, the prosecution had not established any evidence that would eliminate the possibility of third party involvement in this crime. The involvement of a third party was thus a probability, in the light of the prevailing evidence (see paras 46, 48 & 52).

(5) The trial judge in the instant case had erred in not giving sufficient weight to the evidence which were favourable to the evidence and there were gaps in the prosecution's case that did not point irresistibly to the guilt of the appellant. As such, the conviction of the appellant was unsafe (see para 57).

[Bahasa Malaysia summary

Leong Chin Meng ('si mati') didapati telah dibunuh di kedainya yang menjual barangan antik ('premis'). Apabila adik perempuan si mati pulang ke premis tersebut, di tingkat atas yang dijadikan tempat penginapan si mati dan adik perempuannya, dia dapati gril lipat berkunci dan perayu duduk di kawasan perniagaan premis. Menurut adik perempuan si mati perayu perayu kelihatan pucat dan berpeluh apabila dia bertanyakan di mana abangnya dan kenapa dia di premis yang berkunci itu. Adik perempuan si mati kemudian mengarahkan perayu memberikannya segugus kunci untuk membuka gril sebelum masuk ke premis itu dan masuk ke bahagian belakang premis di mana dia menemui mayat si mati yang penuh darah dan diikat. Ahli patologi forensik mengesahkan sebab kematian adalah kerana asfiksia akibat dicekik secara manual dan kecederaan teruk di kepala. Perayu yang telah melarikan diri dari tempat kejadian dengan motosikal telah berjaya ditangkap dan dituduh dengan kesalahan membunuh di bawah s 302 Kanun Keseksaan. Dalam pembelaannya perayu, pelanggan tetap si mati, telah memberi keterangan bahawa dia berada di premis tersebut untuk bertanyakan si mati tentang kualiti tiga duit syiling lama yang dipersoalkan yang telah dijual oleh si mati kepadanya sehari sebelum itu. Menurut perayu, apabila dia masuk ke dalam premis itu dia secara spontan telah menutup gril itu, yang secara automatik terkunci dengan sendirinya, dan bahawa dia kemudian menemui si mati terbaring diikat dan tidak bergerak. Dia kemudian memberi keterangan bahawa dia ditemui adik perempuan si mati semasa dia mencari kunci untuk membuka gril itu dan setelah membukanya dia meninggalkan tempat itu dalam keadaan cemas dan ketakutan. Hakim perbicaraan berpuas hati bahawa kes prima facie telah dibuktikan oleh pihak pendakwaan terhadap perayu dan bahawa pembelaan perayu, yang hanya merupakan penafian semata-mata telah gagal menimbulkan keraguan munasabah ke atas kes pendakwaan. Perayu telah disabitkan kerana membunuh, dan justeru itu rayuan ini. Perayu berhujah bahawa hakim perbicaraan telah salah arah kerana gagal mengambilkira keseluruhan keterangan dan oleh itu gagal melihat beberapa lompang dalam kes pendakwaan. Perayu berhujah bahawa hakim perbicaraan telah gagal mengambilkira ketiadaan kesan darah pada kemeja putih yang dipakai oleh perayu; ketiadaan apa-apa cap jari atau bukti DNA yang mengaitkannya kepada jenayah itu; ketiadaan apa-apa motif untuk pembunuhan itu; dan kemungkinan penglibatan pihak ketiga dalam kematian si mati.

Diputuskan, membenarkan rayuan:

(1) Ahli patologi forensik telah memberi keterangan bahawa si mati telah mengalami kecederaan di kepala sebelum dia diasfiksiakan. Oleh itu jelas bahawa si mati telah berdarah sebelum dia dicekik secara manual. Selanjutnya ekshibit fotograpik juga menunjukkan bahawa terdapat darah yang banyak pada mayat si mati dan juga di kawasan di mana si

mati terlantar. Walau bagaimanapun, tiga saksi pendakwaan yang melihat perayu di premis, tidak menyatakan apa-apa tentang kesan darah pada kemeja-T putih yang dipakai oleh perayu. Kegagalan oleh pihak pendakwaan untuk mengemukakan isu ini menimbulkan beberapa keraguan berhubung sama ada ia boleh disimpulkan bahawa kematian si mati telah disebabkan oleh atau diakibatkan oleh tindakan perayu (lihat perenggan 29–30 & 33).

(2) Meskipun tiada cap jari ataupun DNA perayu ditemui di tempat kejadian jenayah, perayu berada di tempat kejadian. Oleh itu, tiada merit dalam hujah perayu bahawa ketiadaan apa-apa kaitan forensik untuk menimbulkan keraguan dalam kes pendakwaan (lihat perenggan 34 & 37).

(3) Motif am jenayah bukan faktor penting, tetapi oleh sebab kes pendakwaan berdasarkan semata-mata atas keterangan mengikut keadaan, motif adalah penting. Sepanjang perbicaraan ini pendakwaan hanya mencadangkan satu motif, iaitu perayu marah dengan si mati kerana dia tidak gembira dengan salah satu daripada tiga duit syiling yang telah dibelinya daripada si mati. Walau bagaimanapun, cadangan itu bukan keterangan dan berdasarkan cadangan itu maka tidak boleh dikatakan bahawa pendakwaan telah membuktikan motif pembunuhan (lihat perenggan 41–42).

(4) Kehadiran beg yang ditemui di tempat kejadian dan telah diserahkan kepada pegawai penyiasat ('PP') telah hilang dari kawalan polis. Meskipun PP, semasa memberi keterangannya, mengesahkan bahawa beg ini menjadi bukti penting yang boleh membuktikan kehadiran pihak ketiga di tempat kejadian jenayah tetapi masih kurang siasatan ke atas perkara ini. Oleh itu, pendakwaan tidak membuktikan apa-apa keterangan yang boleh melenyapkan kemungkinana penglibatan pihak ketiga dalam jenayah ini. Penglibatan pihak ketiga dengan itu berkemungkinan, berdasarkan keterangan yang sedia ada (lihat perenggan 46, 48 & 52).

(5) Hakim perbicaraan dalam kes ini terkhilaf kerana tidak memberikan tumpuan mencukupi kepada keterangan yang berpihak kepada keterangan dan terdapat lompang dalam kes pendakwaan yang tidak menunjukkan kebersalahan perayu. Oleh itu, sabitan perayu tidak selamat (lihat perenggan 57).]

Notes

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1698–1776.

Cases referred to

Chan Chwen Kong v Public Prosecutor [1962] MLJ 307, CA (refd)
Chandmal & Anor v State of Rajasthan AIR 1970 SC 917 (refd)
Chang Kim Siong v Public Prosecutor [1968] 1 MLJ 36, FC (refd)

Legislation referred to

Penal Code s 302

Appeal from: Criminal Trial No 45–30 of 2007 (High Court, Pulau Pinang)

Simon Murali (Lio & Partners) for the appellant.
Najib bin Zakaria (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hasan Lah JCA:

INTRODUCTION

[1] The appellant was charged in the High Court, Pulau Pinang with the offence of murder under s 302 of the Penal Code. The charge framed against him read as follows:

> Bahawa kamu pada 24.4.2006, antara jam lebih kurang pukul 1.30 petang dan 3.00 petang, di alamat 65A, Jalan Masjid Kapitan Keling, di dalam Daerah Timur Laut Negeri Pulau Pinang, dengan niat telah melakukan kesalahan bunuh hingga menyebabkan kematian ke atas Leong Chin Meng (No. K/P: 571127-07-5771), dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] At the conclusion of the trial the learned trial judge convicted the appellant for murder. The appellant appealed against his conviction and we allowed his appeal and set aside his conviction. We hereby give our reasons for doing so.

THE FACTS

[3] The facts showed that the deceased operated a business dealing with antiquated items such as old coins, stamps and other artefacts. The business was carried out in the name and style of Leong Stamps Co in a premise at No 65–A, Jalan Masjid Kapitan Keling, Penang ('the said premise').

[4] There was a collapsible grill at the entrance of the said premise. The upper floor of the said premise was utilised as an accommodation for the deceased and his sister, PW4.

[5] On 24 April 2006 when PW4 returned to the said premise from work at around 3.30pm she found the collapsible grill locked. She also saw the appellant seated on a chair in the business area of the said premise. The appellant was seen scrapping a drawer of a particular table with a screwdriver.

[6] PW4 screamed at the appellant and questioned him on the whereabouts of her brother, the deceased. The appellant, appeared pale and perspiring, told PW4 that the deceased was in the lavatory and it was the deceased who had asked him to sit by that table.

[7] PW4 demanded the appellant to open the grill and directed him to handover to her the bunch of keys. The appellant handed her the keys.

[8] PW4 unlocked the grill and immediately rushed to the back of the said premise where the kitchen and lavatory were located. There she found her brother's bloodied body, with both his hands and legs bound with adhesive or duct tape while the head was covered with a T-shirt. The body was facing downwards. There was a wooden stool placed over his head and a gas cylinder on top of the stool.

[9] The appellant fled the scene on a motorcycle. He was arrested on 29 May 2006, more than a month after the alleged incident.

[10] PW12, the forensic pathologist, testified that the deceased was found to have sustained severe head injury and also fracture of the hyoid bone. PW12 confirmed the cause of the death to be 'Asphyxia due to manual strangulation with severe head injury'.

[11] In the course of his testimony under cross-examination, PW12 expressed the following opinions:

(a) the injury to the deceased's head preceded asphyxia; and

(b) from the scenario of the case, the possibility of more than one person inflicting the head injury on the deceased and proceeding with the manual strangulation cannot be ruled out.

THE DEFENCE CASE

[12] In his defence the appellant testified that he knew the deceased through business dealings. He was a regular customer of the deceased where he had purchased antique items from the deceased on numerous occasions. There had never been any problem in the business dealings between them.

[13] On 23 April 2006, a day before the fateful incident, the appellant came to the deceased's shop and purchased three pieces of vintage coins. These coins were supposed to have been minted during the colonial era when Penang was part of the Straits Settlement. The appellant paid RM300 for the coins.

[14] The appellant took the coins home and later that evening, examined each of them through a magnifying glass. He found certain doubtful features on these coins. He decided to take them back to the deceased on the next day for further enquiry on these coins.

[15] On 24 April 2006 at around 3.15pm, the appellant arrived at the said premise. He found the collapsible grill at the entrance of the said premise was ajar. He called for the deceased. As there was no reply forthcoming despite several calls, the appellant decided to go in.

[16] As he stepped in, without giving much thought, he spontaneously closed the grill, which then automatically locked itself. While inside the said premise he repeatedly called for the deceased, yet, there was no answer. He did not notice anything unusual in the premise.

[17] After waiting for a while, the appellant proceeded to the back of the premise, to look for the deceased. To his horror, he found the deceased sprawled in blood.

[18] The appellant was overwhelmed with panic and fear. His immediate thought was to get out from the premise. He rushed to the entrance but realised that the grill was locked. He frantically searched for the keys.

[19] It was at this juncture, PW4 suddenly appeared in front of the grill. She shouted at the appellant and demanded to know what he was doing there. The appellant's fear escalated. Before he could say anything, PW4 went to the next door and reappeared with PW5 and PW6.

[20] PW4 asked the appellant as to whereabouts of the deceased while demanding him to open the grill. The appellant told PW4 that he did not have the key, to which the latter directed him to look at a certain spot on the table. The appellant found a bunch of keys and handed it over to PW4. PW4 immediately unlocked the grill and rushed to the back portion of the premise.

[21] In the state of panic and fear, the appellant took flight from the premise and went off on his motorcycle. When questioned as to the reason for fleeing the scene, the appellant testified:

Saya merasa sangat takut kerana tidak pernah melihat keadaan sebegitu. Oleh kerana saya tidak mahu dikaitkan dengan kejadian ini kerana saya memang tiada kaitan dengannya, oleh itu saya terus keluar melalui pintu grill yang SP4 telah buka dan saya terus beredar dari tempat tersebut dengan motosikal saya. Tujuan saya beredar ialah saya tidak mahu terlibat dengan kejadian yang saya lihat.

FINDINGS OF THE LEARNED TRIAL JUDGE

[22] At the conclusion of the case for the prosecution the learned trial judge held that based on the circumstantial evidence adduced by the prosecution there was only one irresistible and inescapable conclusion that it was the appellant who was responsible for the death of the deceased. The learned trial judge was satisfied that a prima facie had been proved by the prosecution against the appellant.

[23] With regard to the appellant's defence, the learned trial judge held that the defence was both irreconcilable and ambivalent. It was a mere denial and it failed to raise a reasonable doubt on the prosecution's case.

THE APPEAL

[24] Before this court the main thrust of the appellant's submission was whether the sworn evidence of the appellant had raised a reasonable doubt in the prosecution's case or conversely, whether the circumstantial evidence led by the prosecution irresistibly pointed to the guilt of the appellant.

[25] With regard to the circumstantial evidence the learned trial judge had this to say:

23 True, as submitted on behalf of the accused, that there were no blood stain, or finger print of the deceased traced in this case, but notwithstanding that, the undisputed facts that —

(a) the accused who was known by name ie SIMON by SP4, SP5 and SP6 was there inside the shop shortly before the body of the deceased being discovered sprawling in the kitchen of the shop with full of blood;

(b) that he was then seen seated on a chair and scraping on the drawer of the table;

(c) that the collapsible grill of the shop was then locked;

(d) that when asked by SP4 as what was he doing there, he whose face turned pale and sweating said that SP4's brother (deceased) was in the lavatory and had asked him to be there whereas SP4's brother was already then dead;

(e) that it was the accused who handed over the key to SP4 before SP4 used the same to open the said grill;

(f) that the accused himself pulled the grill apart from inside upon SP4 unlocked it and immediately left the shop on his motorcycle;

(g) that the accused before leaving repeated the same words that was asking SP4 to see her brother whom he said was in the lavatory (ie 'abang kamu ada dalam tandas, pergi tengok, pergi tengok');

(h) that according to Dr Bhupinder the death could have taken place about 3-4 hours or even less as at 4.30pm when he himself examined the body;

(i) that at about 2–2.30pm, another deceased's sister (SP3) spoke over the phone with the deceased before the line was cut off; and

(j) that the spectacle of the deceased was found broken lying at the verge of the door leading to the kitchen. in totality and cumulatively lead to one irresistible and inescapable conclusion that the accused and the accused alone was responsible for the death of the deceased. I am satisfied therefore that the prosecution has established a prima facie case and accordingly called for the accused to enter upon his defence as charged.

[26] Learned counsel for the appellant submitted that the learned trial judge had misdirected himself and committed serious error in failing to consider the entire evidence before him in totality, for if he had done so he would have realised the numerous gaps that were obvious in the prosecution's case.

[27] Learned counsel for the appellant contended that the learned trial judge had either overlooked or disregarded several salient points which are capable of substantiating the case for the defence and riddle the prosecution's case with reasonable doubts. The salient points are:

(a) the absence of blood stain on the white shirt worn by the appellant;

(b) the absence of any finger prints or DNA evidence connecting the appellant to the crime;

(c) the absence of motive for the killing; and

(d) the possible involvement of third person in the death of the deceased.

THE ABSENCE OF BLOOD STAIN

[28] In his evidence, the appellant said that he was wearing a white coloured T-shirt of Polo brand and a brown coloured pants on the material date and time, when he was in the said premise. The prosecution did not challenge this piece of evidence during the cross-examination of the appellant.

[29] PW12, the forensic pathologist, expressed his view that the deceased sustained head injuries before he was manually strangulated resulting in asphyxia and consequently, death. The photographs marked as exhs

P4(5)–P4(28) revealed the extent of brutality in the killing of the deceased, where massive blood can be seen on the body of the deceased as well as in the vicinity where he lay sprawled. The cloth that covered the deceased's head was soaked in his blood. It was established through forensic evidence that the blood found on the body of the deceased as well as in the vicinity were that of the deceased alone.

[30] With regard to this aspect of the evidence, learned counsel for the appellant submitted that whoever caused the death of the deceased would definitely have had the deceased's blood stained on his apparel. This is due to PW12's evidence that the deceased sustained head injuries before he was asphyxiated. This would mean that the deceased bled before he was manually strangulated.

[31] We have perused in detail the grounds of decision of the learned trial judge and we were satisfied that the learned trial judge had failed to give adequate consideration to this aspect of evidence when he assessed the appellant's defence. We agree with the submission of learned counsel for the appellant that manual strangulation would not be possible without some bodily contact between the deceased and his assailant. As such blood stain on the clothing of the assailant would be an inevitable occurrence. If the appellant were the assailant on that day, his white shirt would surely be stained with the deceased's blood.

[32] In her evidence, PW4 did not mention about any bloodstain or any sort of stain on the appellant's white shirt. PW4 had the appellant under her observation for a considerable period of time. The appellant had even approached PW4 to handover the bunch of keys. The proximate distance between the appellant and PW4 availed the latter of a clear view of the former. She was even able to notice the perspiration of the appellant. As such if there had been any bloodstain on the appellant's white shirt, it would have been the most noticeable of all things observed by PW4 or PW5 and PW6.

[33] The fact that the three prosecution witnesses, who saw the appellant in the premise, made no mention of any bloodstain on the shirt worn by the appellant clearly showed there was no such stain in the first place. In this connection, we reminded overselves that the burden of proof throughout the case to prove its case beyond reasonable doubt lies on the prosecution. In our view, the failure on the part of the prosecution to address this issue did raise some doubt as to whether it could be conclusively said that the deceased's death had been caused by or in consequence of the act of the appellant. It is also our view that this crucial fact corroborated the appellant's narrative that his presence in the said premise was a matter of pure coincidence and he had nothing to do with the murder that took place there.

ABSENCE OF ANY FORENSIC LINK

[34] The crime scene investigation team led by PW13 conducted finger print dusting and took samples of blood found at the scene. It was beyond dispute that neither the appellant's finger print nor any DNA that matched his profile were found at the crime scene.

[35] Learned counsel for the appellant submitted that the absence of any forensic evidence linking the appellant to the death of the deceased clearly exonerated him from the offence for which he was charged. Learned counsel further submitted that the learned trial judge, despite recognising the absence of such evidence, failed to appreciate its relevance to the defence of the appellant.

[36] The learned deputy public prosecutor argued that as the appellant was arrested about 30 days later the DNA profile of the deceased could no longer be found in the samples taken from the appellant's nail.

[37] It is true that neither the appellant's finger print nor any DNA that matched his profile were found at the crime scene. However, it was clear from the evidence that the appellant was present at the crime scene. As such we found no merit in the appellant's argument that the absence of any forensic link had weakened the case for the prosecution or raised doubt in the prosecution's case.

ABSENCE OF MOTIVE

[38] As regards motive, the learned trial judge made a finding that the purpose of the appellant's presence there was to confront the deceased about the unsatisfactory features and questionable quality of the three old coins the deceased sold to him a day before.

[39] Learned counsel for the appellant submitted that the prosecution had not adduced any evidence to show motive on the part of the appellant to kill the deceased. Learned counsel contended that to assume the appellant killed the deceased in the manner that was done here simply because the appellant was not satisfied with the coins he purchased from the deceased was ludicrous and defied logic.

[40] In response to that the learned deputy public prosecutor submitted that based on their relationship that they dealt in antique items, the plausible motive for the killing was business rivalry. It was also submitted that motive was not essential in the offence of murder.

[41] Although in general motive of a crime is not an essential factor that ought to be considered, but where the prosecution's case is based solely on circumstantial evidence, motive is important in such cases to tilt the scale against the accused. In *Ratanlal and Dhirailal Law of Crimes*, (24th Ed), Vol 22 at p 1448, the learned author articulated:

> ... Ordinarily, when there is sufficient, direct and circumstantial, evidence connecting the accused with the commission of the offence the proof of motive become unimportant. But where the entire prosecution case rests on circumstantial evidence, motive undoubtedly plays an important part in such cases to tilt the scale against the accused, and if as in the instant case, the prosecution evidence has failed to prove sufficient motive for the murder of his newly wedded wife on the part of the accused-respondent, and the circumstances relied upon by the prosecution appeared to be equivocal and not conclusive of his guilt, the acquittal of the respondent as ordered by the High Court must be upheld …

[42] When the appellant was cross-examined by the deputy public prosecutor it was suggested to him that he was angry with the deceased because he was not happy with one of the coins he purchased from the deceased. The appellant denied that. Throughout the trial, that was the only motive suggested by the prosecution for the killing of the deceased. A suggestion is not an evidence. Based on the suggestion it could not be said the prosecution had established the motive for the killing. On the evidence available, we agree with the submission of learned counsel for the appellant that the prosecution had not established the motive for the killing of the deceased. In our view it was wrong for the learned trial judge to assume that the appellant killed the deceased because he was not satisfied with the coins he purchased from the deceased.

THE POSSIBLE INVOLVEMENT OF THIRD PERSON

[43] In her evidence PW3 adverted to a news article in a Chinese daily (*Guang Meng*), in which she pointed to a picture of the scene where the deceased's body was found. This picture shows a bag, resembling a hand luggage or sport bag, found in the proximity of the deceased's body.

[44] PW3 testified that she found the bag at the spot where the deceased's body was sprawled. She informed the investigating officer, PW11, about the bag. PW11 confirmed receiving the bag. According to PW3, the said bag did not belong to her, PW4 or even her deceased brother. The bag contained some apparatus like screwdrivers, spanners and bolt removers.

[45] The appellant in his evidence testified that the bag did not belong to him either. The appellant's evidence in this regard was not challenged, nor was it put to him by the prosecution that he was the owner of the bag.

[46] PW11 in his evidence confirmed that the bag constituted a piece of crucial evidence capable of proving the presence of third persons at the crime scene and possible involvement in the murder of the deceased. Yet, no attempts were made to trace for fingerprints on the bag. Worse still, the bag was not properly kept in the custody of the police leading to its mysterious disappearance from the possession of the police.

[47] Based on the appellant's evidence, when he entered the premise, the deceased was lying motionless facing the ground with both his wrists and legs bound.

[48] On this issue, learned counsel for the appellant submitted that the possibility of a third person or persons involved in or linked to the death of the deceased could not be eliminated. The involvement of a third party in this crime was therefore not a fanciful conjecture but a probability in the light of the prevailing evidence.

[49] Learned counsel for the appellant further argued that the said premise was accessible to the public. It was a shop selling antiquated items. Potential customers do come in and move around the premise. The premise would be opened for business from 10am–7pm. Learned counsel for the appellant further submitted that under the circumstances it was not difficult for the assailants to enter the premise, took control of it and assaulted the deceased to death.

[50] In response, the learned deputy public prosecutor submitted that though there was lack of investigation done by PW11 on the bag and the involvement of a third person, that did not cause any gap in the prosecution's case as the prosecution had adduced overwhelming evidence against the appellant. The learned deputy public prosecutor argued that the bag might possibly belong to the appellant bearing in mind that the appellant appeared pale and perspiring and he left the scene immediately after the grill was unlocked.

[51] With regard to the possibility of the involvement of a third person in the crime, the learned trial judge said:

32 Granted, the contention of the learned counsel about the possibility of the presence of the third person in the light of the absence of the mysterious bag containing screw driver and shoes being produced is not all together untenable except the said bag is not as mysterious as it was referred to by learned counsel. Although the said *Guang Meng Daily* was only referred to as 'ID' but since the existence of the said bag as was pictured there is not in dispute, the said contention of the learned counsel is to my mind, deserve consideration. The investigation on the finger printing on the said bag had it being done might have thrown some light one way or the other as to ownership of the said bag. It is indeed very frowning and unthinkable that the I0 having received the said bag had deem it irrelevant to the investigation simply because the death of the deceased had nothing to do with any of the sharp weapon whereas the said bag could not have possibility be there in the kitchen by itself.

33 Be that as it may, considering the overwhelming evidence of the prosecution I am on the view that the evidence against the accused is far outweighed the failure to investigate and produce the said bag itself …

[52] We are of the view that on the evidence available the involvement of a third party in this crime was not a fanciful conjecture but a probability in the light of the fact that the appellant's white shirt was not stained with the deceased's blood. In addition the prosecution did not establish any evidence that would eliminate the possibility of a third party involvement as PW11 did not make any effort to investigate the bag.

HAS THE PROSECUTION PROVED THE CASE BEYOND REASONABLE DOUBT AT THE CONCLUSION OF THE CASE?

[53] In this case the prosecution relied purely on circumstantial evidence to prove its case against the appellant. The onus on the prosecution, where the evidence relied on is circumstantial, is a very heavy one and that the evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient (*Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36). Where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner? (*Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307).

[54] In *Chandmal & Anor v State of Rajasthan* AIR 1970 SC 917, the Supreme Court of India in dealing with circumstantial evidence had this to say:

> It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. That is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt.

[55] One of the main evidence adduced by the prosecution against the appellant was that he was inside the said premise shortly before the body of the deceased was discovered by PW4 and the appellant, after unlocking the grill of the said premise from inside, left the scene immediately.

[56] With regard to these evidence we are of the view that no adverse inference of guilt could be drawn against the appellant from the fact that he was present in the vicinity of the crime and his immediate disappearance from the scene. The appellant had explained that he went to see the deceased on that day to enquire about the coins he bought from the deceased the day before. He explained what had happened to the grill when he was inside the said premise. He also explained that he took flight from the scene of the crime after the grill was unlocked because he was in a state of panic and fear. An innocent man faced with such situation might foolishly react in that way. More importantly, there was no direct evidence to link the appellant to the killing that took place in the said premise.

CONCLUSION

[57] Based on the reasons given above, we were unable to agree with the learned trial judge's finding that the prosecution had proved its case against the appellant beyond reasonable doubt. It is our judgment that the learned trial had erred in not giving sufficient weight to the evidence which were favourable to the defence. We find the circumstantial evidence adduced by the prosecution did not point irresistibly to the conclusion of the guilt of the appellant. There were gaps in the prosecution's case as we have discussed earlier. Under the circumstances, the conviction of the appellant was unsafe.

[58] It was for the foregoing reasons that the appellant's conviction was quashed, the sentence of death was set aside, and the appellant was acquitted and discharged.

Appeal allowed.

Reported by Kohila Nesan